

1
2
3
4
5
6
7
8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF OREGON

10 DAVID WOOD,

Civil No. 08-6028-AA
OPINION AND ORDER

11 Plaintiff,

12 vs.

13 MICHAEL J. ASTRUE,
Commissioner of Social Security,

14 Defendant.

15
16 Kathryn Tassinari
Harder, Wells, Baron & Manning, P.C.
474 Willamette, Suite 200
17 Eugene, Oregon 97401
Attorney for plaintiff

18
19 Karin Immergut
United States Attorney
District of Oregon
20 Britannia Hobbs
Assistant United States Attorney
21 1000 S.W. Third Avenue
Portland, Oregon 97204-2902

22
23 David Burdett
Special Assistant U.S. Attorney
Social Security Administration
24 701 Fifth Avenue, Suite 2900 M/S 901
Seattle, Washington 98104-7075
25 Attorneys for defendant

26 AIKEN, Judge:

27 Claimant, David Wood, brings this action pursuant to the
28 Social Security Act (the Act), 42 U.S.C. §§ 405(g) and

1 1383(c)(3), to obtain judicial review of a final decision of the
2 Commissioner denying his application for disability insurance
3 benefits under Title II of the Act and for Supplemental Security
4 Income (SSI) disability benefits under Title XVI of the Act. For
5 the reasons set forth below, the Commissioner's decision is
6 affirmed and this case is dismissed.

7 **PROCEDURAL BACKGROUND**

8 Plaintiff applied for benefits on December 14, 2004,
9 alleging disability as of July 3, 2003. Tr. 69-71, 215-18. His
10 application was denied initially and upon reconsideration.
11 Plaintiff requested and received a hearing before an
12 administrative law judge (ALJ) on May 30, 2007. Tr. 219. At the
13 hearing, plaintiff amended his claim from an "open" to a "closed"
14 period beginning November 6, 2004, and ending August 1, 2006.
15 Tr. 223-24. The parties agree that as of August 1, 2006,
16 plaintiff has been working at substantial gainful activity levels
17 and is therefore ineligible for benefits since that date.

18 On August 6, 2007, the ALJ issued a decision denying
19 plaintiff's claim for benefits. Tr. 11-21. Plaintiff requested
20 review of the decision which was denied by the Appeals Council on
21 November 21, 2007. Tr. 5-10. Therefore, the ALJ's decision
22 became the final decision of the agency from which plaintiff
23 seeks judicial review.

24 **STATEMENT OF THE FACTS**

25 Plaintiff was 36 years old at the time of the hearing. Tr.
26 224. He completed the 11th grade but failed to earn a high school
27 diploma or General Equivalency Diploma. Id. He has past
28 relevant work as a truck driver, trash collection driver, dump

1 truck driver, industrial cleaner, and a janitor. Tr. 273-74.

2 STANDARD OF REVIEW

3 This court must affirm the Secretary's decision if it is
4 based on proper legal standards and the findings are supported by
5 substantial evidence in the record. Hammock v. Bowen, 879 F.2d
6 498, 501 (9th Cir. 1989). Substantial evidence is "more than a
7 mere scintilla. It means such relevant evidence as a reasonable
8 mind might accept as adequate to support a conclusion."
9 Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting
10 Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)).
11 The court must weigh "both the evidence that supports and
12 detracts from the Secretary's conclusions." Martinez v. Heckler,
13 807 F.2d 771, 772 (9th Cir. 1986).

14 The initial burden of proof rests upon the claimant to
15 establish disability. Howard v. Heckler, 782 F.2d 1484, 1486
16 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate
17 an "inability to engage in any substantial gainful activity by
18 reason of any medically determinable physical or mental
19 impairment which can be expected . . . to last for a continuous
20 period of not less than 12 months. . . ." 42 U.S.C.
21 § 423(d) (1) (A).

22 The Secretary has established a five-step sequential
23 process for determining whether a person is disabled. Bowen v.
24 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502,
25 416.920. First the Secretary determines whether a claimant is
26 engaged in "substantial gainful activity." If so, the claimant
27 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R.
28 §§ 404.1520(b), 416.920(b).

1 In step two the Secretary determines whether the claimant
2 has a "medically severe impairment or combination of
3 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.
4 §§ 404.1520(c), 416.920(c). If not, the claimant is not
5 disabled.

6 In step three the Secretary determines whether the
7 impairment meets or equals "one of a number of listed impairments
8 that the Secretary acknowledges are so severe as to preclude
9 substantial gainful activity." Id.; see 20 C.F.R.
10 §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively
11 presumed disabled; if not, the Secretary proceeds to step four.
12 Yuckert, 482 U.S. at 141.

13 In step four the Secretary determines whether the claimant
14 can still perform "past relevant work." 20 C.F.R.
15 §§ 404.1520(e), 416.920(e). If the claimant can work, she is not
16 disabled. If she cannot perform past relevant work, the burden
17 shifts to the Secretary. In step five, the Secretary must
18 establish that the claimant can perform other work. Yuckert, 482
19 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) &
20 (f). If the Secretary meets this burden and proves that the
21 claimant is able to perform other work which exists in the
22 national economy, she is not disabled. 20 C.F.R. §§ 404.1566,
23 416.966.

24 DISCUSSION

25 1. The ALJ's Findings

26 _____At step one of the sequential analysis outlined above, the
27 ALJ found that plaintiff had not engaged in substantial gainful
28 activity during the closed period from November 1, 2004, through

1 August 1, 2006; thereafter, the parties agree, plaintiff returned
2 to work at substantial gainful activity levels. Tr. 16-17. See
3 20 C.F.R. §§ 404.1520(b), 416.920(b). At step two, the ALJ found
4 that plaintiff had the impairments of cognitive disorder and
5 chronic adjustment disorder, with mixed disturbance of emotions
6 and conduct, a combination that was "severe" within the meaning
7 of the regulations. Tr. 17. See 20 C.F.R. §§ 404.1520(c),
8 416.920(c). At step three, the ALJ found that plaintiff's
9 impairments did not meet or equal the requirements of a listed
10 impairment. Tr. 17-18. See 20 C.F.R. §§ 404.1520(a)(4)(iii),
11 404.1520(d), 416.920(a)(4)(iii), 416.920(d).

12 The ALJ then determined that plaintiff had the residual
13 functional capacity (RFC) to perform work at all exertional
14 levels, with the following non-exertional limitations: not
15 capable of following detailed instructions; able to perform
16 activities within a schedule, maintain a routine, make simple
17 work related decisions, and complete a normal workday/workweek,
18 but should not be required to work with others, and was limited
19 to short/simple tasks; able to ask simple questions, accept
20 instructions, and maintain socially appropriate behavior, but
21 should not be required to work with the general public and should
22 have only limited contact with co-workers, and no teamwork. Tr.
23 18. See 20 C.F.R. §§ 404.1520(e), 404.1545, 416.920(e), 416.945.
24 At step four, the ALJ found that, during the closed period,
25 plaintiff was able to perform his past relevant work within the
26 RFC limitations noted above. Tr. 22. Therefore, the ALJ found
27 plaintiff not disabled.

28 ///

1 2. Plaintiff's Allegations of Error

2 A. ERRONEOUS CREDIBILITY FINDING AS TO PLAINTIFF'S
3 TESTIMONY

4 I find no error in the ALJ's finding that plaintiff's
5 perceptions of his limitations is not totally credible. The ALJ
6 cited clear and convincing reasons supported by substantial
7 evidence for this finding. These reasons included plaintiff's
8 work history, both before and after the closed period, which
9 fails to comport with plaintiff's assertion that his impairment
10 was long-standing. The ALJ also cited plaintiff's activities of
11 daily living, including getting his children ready for school,
12 grocery shopping, and cooking. I agree with the ALJ as supported
13 by the record that plaintiff's assertion that anxiety and
14 cognitive limitations due to a brain injury he suffered at age
15 eight prevented him from working for a discrete period of time
16 (20 months) over 25 years later, is not credible. The ALJ noted
17 that plaintiff suffered the accidental death of his stepson in
18 June 2005, however, this event occurred six months after
19 plaintiff applied for benefits, and has not prevented him from
20 returning to work. Tr. 19.

21 The ALJ offered clear and convincing reasons for rejecting
22 plaintiff's allegation of disability, which are supported by
23 substantial evidence. I will uphold that finding.

24 B. IMPROPER EVALUATION OF EXAMINING PSYCHOLOGIST'S
25 OPINION

26 Peter Moutlon, Ph.D., examined plaintiff on February 9,
27 2005. Tr. 178-97. Again, the ALJ cited clear and convincing
28 reasons for doubting Dr. Moutlon's conclusion that plaintiff's

1 impairments are longstanding and unlikely to resolve. Tr. 185-
2 190. The ALJ's findings are supported by plaintiff's work
3 history, specifically plaintiff's undisputed resumption of
4 substantial gainful activity as of August 2006. Tr. 223.

5 C. IMPROPER EVALUATION OF LAY WITNESS TESTIMONY

6 Finally, plaintiff argues that the ALJ's failure to
7 properly address the testimony of his partner, Ms. Davis, was
8 error. Even assuming error, I find it was harmless when
9 considered in the context of the record. See Stout v.
10 Commissioner, 454 F.3d 1050, 1056 (9th Cir. 2005) (such error can
11 only be considered harmless if a reviewing court can conclude
12 that no reasonable ALJ, when fully crediting the testimony, could
13 have reached a different disability determination). Here, even
14 crediting Ms. Davis's statements that at times plaintiff was
15 overwhelmed by stress, that she needed to leave him notes around
16 the house to help him get his tasks accomplished, and that he
17 occasionally called in for help to find a particular address
18 while driving his truck, nonetheless these statements fail to
19 explain why plaintiff could not perform work subject to the
20 limitations accounted for in the ALJ's RFC finding.

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 **CONCLUSION**

2 The Commissioner's decision is based on substantial
3 evidence, and is therefore, affirmed. This case is dismissed.
4 IT IS SO ORDERED.

5 Dated this 13 day of January 2009.

6
7
8
9 /s/ Ann Aiken

10 Ann Aiken
11 United States District Judge
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28